BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF:	)	
	)	
ROMANZOF FISHING CO., LLC and	)	
COURAGEOUS SEAFOODS, LP,	)	
	)	
Appellants.	)	OAH No. 05-0795-TAX
	)	2002-2003 Fishery Resource Landing Tax

DECISION

I. Introduction

This is an appeal from an informal conference decision imposing penalties on Romanzof Fishing Co., LLC (Romanzof) and Courageous Seafoods, LP (Courageous) for underpayment of estimated taxes.

Romanzof and Courageous filed a timely appeal and requested an administrative hearing before the Office of Administrative Hearings. The assigned administrative law judge conducted a hearing at which the principals of the two firms testified. Based on the evidence and the testimony at the hearing, the informal conference decision is affirmed.

II. Facts

Romanzof and Courageous are small businesses based in Seattle that operate fishing vessels in Alaskan waters, respectively *M/V Baranof* and *M/V Courageous*. Charles Hosmer is the general manager of both firms, and Marcilyn Foster is the controller for both. The two boats have been fishing in Alaska since 1996 and 1995, respectively.

Alaska imposes a resource landing tax on the value of fish taken from Alaskan waters, pursuant to AS 43.77. At the time the two boats began fishing in Alaskan waters, vessels based outside of the state were required by law to either pay a bond to secure the payment of the landing tax, or to submit quarterly estimated tax payments in lieu of the bond.[1] From the time the boats began fishing, through 1997, Courageous and Romanzof elected to make quarterly estimated tax payments, in lieu of posting a bond. In 1997, the legislature repealed the statute requiring the posting of a bond, effective January 1, 1998.

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[1] AS 43.10.160, *repealed*, §2 ch. 93 SLA 1997; 15 AAC 77.025.

Courageous and Romanzof continued to make quarterly estimated tax payments. In 1999, having learned that the bond requirement had been repealed, Ms. Foster contacted the department and asked whether it was still necessary for an out-of-state vessel to make quarterly estimated tax payments. A representative of the department informed her, correctly, that there was no longer any need or requirement to make the payments. Relying on that advice, Courageous and Romanzof ceased making quarterly estimated tax payments after the second quarter of 1999.

In 2001, the legislature enacted AS 43.77.020(d), which requires all taxpayers subject to the landing tax to estimate their tax liability at the beginning of the calendar year (which is also the tax year) and to make four quarterly estimated tax payments during that year; payment of the tax in full is due no later than March 31 of the next calendar year. The law went into effect on September 25, 2001, for the 2002 tax year, with the initial quarterly estimated tax payment due on March 31, 2002, and payment of the full tax due no later than March 31, 2003. The department did not attempt to contact taxpayers to inform them of the new requirement in advance of the 2002 tax year, and the landing tax return packet for tax year 2001 (published in January, 2002, for the tax due no later than March 31, 2002) did not provide any notice of the requirement to begin filing quarterly estimated tax payments in March, 2002. The landing tax return packet for tax year 2002 (published in March, 2003, for the tax due no later than March 31, 2003) informed taxpayers of the requirement to file quarterly estimated tax payments (which by then had been in effect for a year), in the section titled "Instructions."

Unaware that the Alaska legislature had imposed a new requirement to file quarterly estimated tax payments, neither Romanzof nor Courageous made any quarterly estimated tax payments during 2002. Courageous and Romanzof reviewed and relied on the tax return packet for tax year 2002 when they filed their annual taxes for that year in March, 2003. Despite the reference to the requirement for estimated tax payments in that tax return packet, neither Courageous nor Romanzof made any estimated tax payments in 2003.

On December 8, 2004, the department completed an examination of the 2002 and 2003 tax returns of Courageous. Because Courageous had failed to make any quarterly estimated tax payments, the department assessed a penalty and on June 16, 2005, issued a

notice of demand for payment. On July 5, 2005, Courageous requested an informal conference. While the request was pending, on August 11, 2005, the department completed an examination of Romanzof's 2002 and 2003 tax returns, assessed a penalty, and issued a notice of demand for payment. Romanzof filed a request for an informal conference on August 23, 2005.

On September 26, 2005, the department issued informal conference decisions upholding both penalties. On October 19, 2005, Courageous and Romanzof filed this joint appeal from both decisions.[2]

III. Discussion

The penalty in this case was imposed under AS 43.77.020(d), which both creates the obligation to file quarterly estimated tax payments and provides for a penalty in the event the of underpayment of those payments. The department argues that the penalty is mandatory and may not be abated. This argument has two components: first, that the penalty is must be mandatory, *i.e.*, that it must be assessed; and second, that it may not be abated, *i.e.*, that the department lacks discretion to remove it for reasonable cause at the taxpayer's request. Both points have previously been decided in the department's favor: the penalty is mandatory, and there is no statute or regulation authorizing abatement.[3]

Courageous and Romanzof argue that it is unfair to impose a penalty because they relied on the department's 1999 advice that no quarterly payments of estimated taxes were owed, the department did not notify them of the change in law in advance of their obligation to comply, and the department did not impose a penalty until two years after they had made payment.

In the absence of any statute or regulation that provides for abatement of the penalty for underpayment of estimated taxes, the taxpayers' argument may be considered

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[2] The appeal letter purports to appeal the assessment of a penalty for the 2004 landing tax. However, the informal conference decisions in the record address only the 2002 and 2003 returns, and there is no indication in the record that an informal conference was requested regarding a penalty for the 2004 tax year. The taxpayers' post-hearing memorandum abandons any objection to the penalty imposed for 2004.

[3] In Re Western Queen Fisheries, LLC, OAH No. 05-0775-TAX (August 9, 2006), at 7-8 ("The statutory language is not ambiguous. Although it does not use an explicit mandatory ('shall' or 'must pay') formulation, the law unequivocally provides that the taxpayer who does not make the required estimated payments 'will be subject to an estimated tax penalty....'). The penalty, although not subject to abatement by the department, may be compromised, for cause shown, with the approval of the attorney general. AS 43.05.075(b). A compromise is an agreed resolution between the parties requiring the consent of the attorney general, and is not a remedy available in an administrative appeal under AS 43.05.400-.499.

as raising a claim of equitable estoppel. Under the doctrine of equitable estoppel, a state agency may be barred from asserting a particular claim or defense if: (1) the agency asserted a position; (2) a person reasonably relied on the assertion; (3) the person was prejudiced as a result; and (4) estoppel serves the interests of justice by limiting the public injury.[4] The doctrine has been applied in Alaska to bar the invocation of a statute of limitations as a defense against a taxpayer's claim for refund of overpaid taxes.[5] However, no Alaska case has been found in which the doctrine was applied to bar the collection of a tax or penalty due under law, and there is substantial authority to suggest that even though the doctrine is generally applicable to state agencies in Alaska, it does not apply with respect to the collection of taxes by the department.[6]

It is not necessary to decide whether the doctrine of equitable estoppel applies in a tax penalty case, because even if the doctrine is applicable, the taxpayers would not be entitled to invoke it under the facts of this case.

The first requirement for application of the doctrine of equitable estoppel is that the agency must have communicated a position to the person claiming the benefit of the estoppel. Courageous and Romanzof have shown this: in 1999, the department advised them, correctly, that there was no requirement to pay quarterly estimated taxes.

The second requirement is that the person must have reasonably relied on the agency statements. In this case, while it may have been reasonable for the taxpayers to

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4 *See, e.g.*, Crum v. Stalnaker, 936 (P.2d 1254, 1256-1258 (Alaska 1997); Mortvedt v. State, Department of Natural Resources, 858 P.2d 1140, 1142-1144 (Alaska 1993).

5 State v. Reefer King Co., Inc., 559 P.2d 56, 64 (Alaska 1976).

6 The department has previously concluded that the doctrine of equitable estoppel "does not run against the State for the collection of taxes." In re Taxpayer, Decision No. 89-034 (Department of Revenue, July 28, 1989), 1989 WL 129050 at 8, *citing* K&L Distributors, Inc., v. State of Alaska, 184 F.Supp. 496, 502 (D. Alaska 1960). *See also*, In Re Marathon Oil Company, No. 8-OTA-97, (Department of Revenue, October 23, 1998), 1998 WL 1990729 at 18 ("Matters of equity will generally not estop the government from asserting its power to tax."); *compare,* In Re Flowers, No. 86-23 (September 30, 1986), 1986 WL 66465 (estoppel not established by taxpayer). Some states take the position that equitable estoppel does not apply in tax cases. *See, e.g.,* Hollingsworth, Inc., v. Johnson, 138 S.W. 2d 863 (Tenn. Ct. App. 2003); State v. Lewis, 832 So.2d 81 (Ala. Civ. App. 2002). Other states have found the doctrine of equitable estoppel applicable in tax cases, however, and the doctrine appears to have gained ground in tax cases in recent years. *See, e.g.*, Valencia Energy Co. v. Arizona Department of Revenue, 959 P.2d 1256 (Arizona 1998); Foote's Dixie Dandy, Inc. v. McHenry, 607 S.W. 2d 323 (Arkansas 1980), Annotation, *Estoppel of State or Local Government in Tax Matters*, 21 A.L.R.4th 573 (1983). *See also*, Annotations, 170 ALR Fed 447, 176 ALR Fed.

rely on the department's statement with respect to their obligations in 1999,[7] they could not reasonably rely on the department's 1999 statement for purposes of their tax obligations in 2002 and 2003. The legislature frequently changes the tax laws, and the department has no obligation to inform taxpayers in general every time the law changes.[8] Nor did the department have any obligation to inform Courageous and Romanzof in particular when the provision they had inquired about in 1999 was amended in 2001.[9] Rather, it was their continuing obligation, with each new tax year, to determine applicable law and to make the appropriate payments in light of any changes in the law. Their continued reliance on the 1999 statements of the department even after receiving the 2002 tax return packet, which expressly advised them of the need to file estimated tax payments, is even less defensible. That the department did not seek a penalty sooner, and that it had initially accepted their 2002 and 2003 filings, does not mean that it could not later seek a penalty provided for by law.[10] Because Courageous and Romanzof did not reasonably rely on the department's 1999 statements in 2002 and 2003, they have not satisfied the second of the four requirements for application of the doctrine of equitable estoppel.

The third requirement is that the person must have been prejudiced. Courageous and Romanzof assert that they have been prejudiced because they must now pay a penalty. But the penalty for underpayment of estimated taxes is the same as the rate of interest on delinquent taxes.[11] The penalty for underpayment of estimated taxes is

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[7] *Cf.* In Re New West Fisheries, Inc., No. 5-OTA-97 (March 5, 1998), at 7, *citing* Gilmore v. United States, 443 F.Supp. 91 (D. Md. 1977). In this decision, the Office of Tax Appeals found reasonable cause to abate a penalty; it did not address whether the department was equitably estopped to impose a penalty.

[8] *See, e.g,* Anderson v. State, 435 N.W.2d 74 (Minn. App. 1989) (taxpayers could not reasonably rely on existing law to remain unchanged). By comparison, if a promise had been made not to change the law, and the taxpayers had reasonably relied on it, there might be grounds for a claim of promissory estoppel. *See* Simpson v. Murkowski, 129 P.3rd 435 (Alaska 2006).

[9] Even if a change is the result in a new interpretation of existing law by the department, rather than a legislative change, the department may impose the change retroactively except for taxpayers who have received a revenue ruling on the point of law in question, and detrimentally relied on it, resulting in "extreme adverse circumstances." *See* Wien Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1087, 1096 (Alaska 1982).

[10] In Re Taxpayer, No. 92-055 (Department of Revenue, July 7, 1992), 1992 WL 687134 at 5 (taxpayer could not reasonably rely on the department's failure to impose penalty prior to appeal as basis for avoiding a penalty); *see* Automobile Club of Michigan v. Commissioner of Internal Revenue, 353 U.S. 180, 183, 77 S.Ct. 707, 709, 1 L.Ed.2d 746, 750 (1956 ("The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law."); *accord*, In Re Alaska Interstate Company, No. 81-29 (Department of Revenue, September 22, 1981), 1981 WL 11541 at 13.

[11] AS 43.77.020(d); AS 43.05.225(1).

compensation to the state for the loss of use of the estimated tax payments, rather than a sanction for the taxpayer's noncompliant behavior.[12] Accordingly, imposition of a penalty does not result in any substantial harm to Courageous and Romanzof: they had the use of the estimated tax payments during the time the payments were due and unpaid, and the penalty takes the value of that use (measured as interest) from them and gives it to the state, which was entitled to the use of the money during that time.[13]

The fourth requirement for application of the doctrine of equitable estoppel is that it serves the public interest by minimizing the injury to the public. In this case, an estoppel against the state would not be in the public interest, because it would result in a private party retaining a windfall (the value of the use of money that should have been paid to the state) at the state's expense. Because an estoppel would not serve the public interest, Courageous and Romanzof have not satisfied the fourth requirement for application of the doctrine of equitable estoppel.

IV. Conclusion

Imposition of the tax penalty for the tax years 2002 and 2003 was mandatory. There is no provision for abatement of the penalty. There is no basis for a finding of estoppel against the department under the facts of this case. Imposition of an interest-based penalty under the circumstances of this case is not unfair.

DATED September 21, 2006.

Andrew M. Hemenway
Administrative Law Judge

NOTICE

This is the decision of the Administrative Law Judge under AS 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.[14]

A party may request reconsideration in accordance with AS 43.05.465(b) within 30 days of the date of service of this decision.

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[12] Federal law provides for an "addition" to the federal income tax, in the event of underpayment of estimated taxes, not a "penalty". *See* 26 U.S.C. §6655.

[13] *See* Valencia Energy Co. v. Arizona Department of Revenue, 959 P.2d 1256, 1268-69 (Arizona 1998).

[14] AS 43.05.465(f)(1).

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.[15] A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.[16]

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 43.05.480 within 30 days after the date on which this decision becomes final.[17]

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:
Hosmer / Foster

Chris Pegg, ANC
Signature

9-21-06
Date

15 AS 43.05.470.
16 AS 43.05.470(b).
17 AS 43.05.465 set out the timelines for the decision becoming final.